



**Solacher v Romantic Hotels Limited & another (Civil Appeal  
167 of 2019) [2022] KECA 771 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KECA 771 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL 167 OF 2019  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JUNE 10, 2022**

**BETWEEN**

**PETER SOLACHER ..... APPELLANT**

**AND**

**ROMANTIC HOTELS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH BRUNLEHNER ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the ruling of the High Court at Mombasa delivered by  
Chepkwuony, J. on 27th March, 2019 In HCC Case No. 74 of 2010 (Consolidated  
with HCC Case No. 20 of 2011 and HCC Case No. 111 of 2008)*

**JUDGMENT**

1. This appeal arises from the ruling of the High Court at Mombasa delivered on 27<sup>th</sup> March 2019 dismissing the appellant's application for review of an order of the High Court given on 30<sup>th</sup> August 2012. The brief background of the case is that the appellant filed Mombasa High Court Civil Case No. 111 of 2008 (HCCC) against Diani Peak Ltd challenging a threatened eviction against him on grounds there was a subsisting lease between them. The appellant also filed HCCC No. 74 of 2010 against the respondents, to recover a loan advanced to the 1<sup>st</sup> respondent and guaranteed by the 2<sup>nd</sup> respondent. Then the Romantic Hotels Kenya Ltd, the 1<sup>st</sup> respondent in HCCC No. 74 of 2010 sued the appellant in Malindi HCCC No. 20 of 2011 as its tenant for nuisance on account of playing loud music.
2. Then in 2012 the 2<sup>nd</sup> respondent filed an application dated 13<sup>th</sup> June 2012 seeking to have HCCC No. 20 of 2011 transferred to Mombasa and to have HCCC No. 20 of 2011 and HCCC No. 74 of 2010 consolidated with HCCC No. 111 of 2008. Meoli, J. granted the order on 30<sup>th</sup> August 2012. The application is at page 35 of the record of appeal.



3. In an application dated 20<sup>th</sup> November 2018, the appellant sought to have the order consolidating the three suits reviewed. The appellant premised the application on the grounds on the face of the Motion and the supporting affidavit. Three grounds were raised, firstly, that consolidating the three suits was a mistake and an error on the face of the record for reason the dispute in HCCC No. 74 of 2010 was commercial in which the plaintiff [appellant] was seeking money loaned to the defendant [respondent], while the disputes in the other two suits were on the right to the use or occupation of land, that the High Court did not have jurisdiction to hear the dispute on use or occupation of land and the parties were different; secondly, that the purported consent order to have the cases consolidated was obtained ex parte by the respondents in HCCC No. 20 of 2011 by falsely representing to the court that the issue of fact and law in this case are the same as the issues of fact and law in HCCC No. 20 of 2011 and HCCC No. 111 of 2008; and, that hearing and determining the cases as one action will taint the proceedings with ultra- vires and nullities.
4. The respondents opposed the application, terming it an abuse of the court process as the consolidated matter was part heard, and the appellant had closed his case; that the order of Meoli, J. consolidating the three suits was not obtained ex parte, as the appellant's counsel wrote to the respondents counsel and copied to the Deputy Registrar of the Court a letter dated 24<sup>th</sup> August 2012 stating that he had no objection to the transfer of Malindi HCCC No. 20 of 2011 to Mombasa and to the consolidation of the three matters for hearing, a letter the learned Judge considered before making the order. The respondent contended that the cases involved the same parties, that no prejudice will be suffered by the appellant if the cases proceeded; that the appellant was guilty of laches, bringing the application late in the day; and, there was no new matter, no error on the face of the record, nor any other sufficient cause adduced by the appellant to warrant a review of the said order.
5. That application was heard by Chepkwony, J. and was dismissed on the 27<sup>th</sup> March 2019. The High Court found that the impugned order was entered into by consent and could not be set aside or varied unless it was shown to have been obtained by fraud or collusion. The court noted that the appellant had not filed a further affidavit to controvert or challenge the letter by his counsel dated 24<sup>th</sup> August 2012 annexed to the respondents replying affidavit to the appellant's application.
6. On the second limb of issues, the High Court found that the appellant failed to meet parameters for succeeding in an application for review. The High Court noted that the application for review was filed 6 years after order was made, and that the delay in bringing the application was unexplained and inordinate.
7. Lastly, on the issue of jurisdiction the High Court found that the issue ought to have been brought in the proper procedure to enable the court determine the same on merit and not in an application for review.
8. It is against this ruling that the appellant now appeals before this court. The appeal is premised on six grounds, however after considering the grounds they revolve around three issues namely the learned Judge of the High Court erred for failing to appreciate that the claims in HCCC Nos. 111 of 2008 and 20 of 2011 concerned the use and occupation of land which were the reserve of the Environment and Land Court (ELC), and that the causes of actions in the 3 different suits are different and could not be tried together; that the High Court erred for finding that the appellant did not explain the delay in applying for review; and erred for failing to find that the respondents misled the appellant to consent to the consolidation of the suits.
9. The appeal was heard virtually on the 22<sup>nd</sup> February 2022, with Mr. Karina learned counsel for the appellant, and Ms. Metto learned counsel for the respondents appearing for their respective clients.



The learned counsel relied on their filed submissions and in addition Mr. Karina highlighted his before us.

10. Mr. Karina submitted that there was an error on the face of the record in that the High Court [Meoli, J.] entered the order as prayed in the application dated 13<sup>th</sup> June 2012, yet the consolidation sought was for HCCC No. 20 of 2011 and HCCC No. 111 of 2008, thus the High Court, [Chepkwony, J.] erred for failing to de-consolidate the cases. Counsel urged that the consolidation brought issues of jurisdiction, as HCCC Nos. 20 of 2011 and 111 of 2008 concerned possession and use of land while HCCC No. 74 of 2010 was a commercial matter.
11. The respondents opposed the appeal. Ms. Metto learned counsel for the respondent relied on the written submissions. In the written submissions the respondents urge that the appellant consented to the consolidation of the three suits; that the suits are inter-related and involved the same parties and common questions, and thus the Court had jurisdiction to consolidate them.
12. We have considered the submissions by counsel, the cases cited and the record of appeal. We find that two issues commend themselves to us for determination; one, whether the High Court misdirected itself on some matter of law or fact or considered irrelevant matters and thus fell into error; and , two, whether the appeal should be allowed.
13. The matter before the Court challenges the manner in which the High Court exercised its discretion when it considered the application for review under Order 45 Rule 1 of the Civil Procedure Rules. The appeal seeks us to interfere with the discretion of the High Court. As such, the parameters of our approach are well defined. If the discretion was exercised judiciously, we cannot interfere simply on the ground that if we were sitting at first instance, we might have given different weight to that given by the judge. In Mulemi v Angweye & another (Civil Appeal 170 of 2016) [2021] KECA 214 this Court set out the principle that should guide the Court when considering an application seeking to interfere with the exercise of discretion by Superior Courts:

“In Mbogo & Another vs. Shah [1968] E.A 93; at page 94, paragraph H - 1 Sir Clement De Lestang V.-P: had this to say:

I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

[See also] Sir Charles Newbold, P., in the same decision at page 96 paragraph G - H where he expressed himself as follows:

“For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

14. And in United India Insurance Co. Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] eKLR Madan, JA rephrased the principle as follows:-

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from. The Court of Appeal is only entitled to interfere if one or more of the following



matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong”.

15. The learned Judge identified the issues for determination as whether the applicant satisfied conditions of setting aside a consent order, and whether the application for review is merited.
16. We shall consider how the learned Judge considered and determined each of these issues. On the issues whether the High Court directed itself properly when it considered the issue of the consent order. The principles which apply to setting aside of a consent order are well settled. We shall cite only one of many cases discussing these principles. In the case of *Flora Wasike v Destimo Wamboka* [1988] 1 KAR 625 stating:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.... In *Purcell vs F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676;

It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”
17. The appellant has contested the consent order stating that the respondents counsel misled the appellant’s counsel on the nature of the application before the court. In the appellant’s submissions, it is argued that the supporting affidavit to the application dated 13<sup>th</sup> June 2012 spoke to the consolidation of the two suits, that is HCCC Nos. 20 of 2011 and 111 of 2008, and that it was on the basis of the affidavit that counsel for the appellant agreed to the consolidation of the said cases.
18. The respondents’ counsel in reply urged that it was settled law that a consent order has contractual effect and can only be set aside on grounds that would justify setting aside of a contract. Counsel urged that there is no need to review the order consented to by the parties as it has been acted upon, in that the appellant upon consenting to the consolidation of the three cases has actively participated in the suits, prosecuted them and closed his case in all three suits and cannot be heard to seek de-consolidation. The respondents urge that the appellant was aware all along of what was happening in the suits and had no objection. The respondents urged that any order made by consent of the parties was binding to the parties, and cannot be varied unless fraud or collusion or agreement against the policy of the court is proved.
19. The learned Judge found that the order sought to be reviewed was entered by consent of counsels to the parties. The first issue to determine is if there was consent to the consolidation of the three suits. The basis of the finding that there was consent on the part of the appellant was his counsel’s letter dated 24<sup>th</sup> August 2012. The letter is at page 44 of the record. It is addressed to the respondents’ counsel and copied to the Deputy Registrar of the Court. The reference quoted on the letter is HCCC No. 20 of 2011. It refers to the hearing scheduled for 30<sup>th</sup> August 2012. It states that the undersigned that has personal conduct of the matter, that is the advocate for the appellant, was not available on the date set



for the hearing of the application. The letter concludes by stating that they had no objection to the order of consolidation and the matter being brought to Mombasa for hearing.

20. That letter was in response to the respondents' application of 18<sup>th</sup> June 2012. That application is at page 35 of the record. The title is HCCC No. 20 of 2011 and HCCC No. 74 of 2010. It seeks:
  1. That this honourable court do transfer this suit no 20 of 2011 Malindi for trial and disposal at the High Court, Mombasa.
  2. The above – mentioned suits be consolidated with (HCCC No.) 111 of 2008 now in Mombasa and thereafter, be carried on as one action.
  3. ...
  4. ...
21. The grounds for the application on the face of the Motion clearly refers to the consolidation and hearing as one case of the three suits, first the two cited on the title or heading of the application, meaning HCCC No. 20 of 2011 and HCCC No. 74 of 2010 as evidenced on the title, and HCCC No. 111 of 2008.
22. The application by the respondent was clear that it was seeking consolidation of the three suits aforementioned. The consent letter by appellant's counsel was very clear that it was consenting to the prayers sought in the said application. There was nothing misleading on the face of the application. As for the supporting affidavit, having received it together with the Notice of Motion, and having raised no issues or objections to its content, the doctrine of estoppel applies. The order of consolidation was made pursuant to the Motion and the consent letter of the appellant. By virtue of the letter, it is correct to deem that the order made by Meoli, J. consolidating the three cases was made in the presence of both counsel to the parties.
23. Furthermore, the appellant did not file a further affidavit to challenge the respondents' averments in their replying affidavit, or any response to controvert documents annexed to their affidavit, including the impugned consent letter. That in itself can be interpreted to mean the letter and its contents was admitted.
24. The record of appeal shows that the three cases came up for mention several times when the file for HCCC No. 111 of 2008 was said to be missing. That was on various dates between 2017 and 2018. The appellant participated during these mentions. If there was an error in consolidating the three suits, the appellant should have realized this during these mentions, and ought to have made the application to de- consolidate them. Instead, he not only participated in the mentions but prosecuted his part of the case in the three suits.
25. We agree with the learned Judge that the order of 30<sup>th</sup> August 2012 was a consent order. Since the appellant's contention is that the respondents counsel misled them, we agree with the High Court that the appellant ought to have tendered evidence to show there was either fraud, misrepresentation or illegality involved when the consent order was made, or that the appellant's counsel lacked his authority to draw the consent order. No such evidence was adduced.
26. As to the application of the wrong principles of law and failure to take into account relevant factors; the appellant urged that the High Court should have considered the issue of jurisdiction. Counsel relied on *Rep. V. Karisa Chengo* [2017]eKLR for the proposition the High Court has no jurisdiction to entertain land matters, and urged that was sufficient ground to allow review. The appellant relied on Article 165 and 162 (2) of the *Constitution*, which vests jurisdiction on the use and occupation of land in the Environment and Land Court; and, on *Attorney General & 2 Others v. Okiya Omtata Okioti*



§ 14 Others (2020) eKLR for the proposition jurisdiction cannot be derived from nor conferred by consent of parties. The appellant relied on Kenya Ports Authority v Modern Holdings (E.A) Limited 2017 eKLR in agitating that so fundamental is the issue of jurisdiction that it can be raised at any stage, by any party, in any manner and even by the court itself.

27. The respondents urged that the overriding principle of expeditious disposal of cases militates against the setting aside of the consent order consolidating the suits. For that proposition the respondents relied on Stumberg & another v Potgeiter 1970 EA 323, and the Indian Case of Erij Kishore v Bir Singh & Others, [2007] 2Supreme Court Cases 551 ; that the application was an abuse of the court process since the matter was part heard, relying on Chemweli Jenges Mangale & 3 others v Hamisi Mohaned Mwawasaa & 15 others [2016]eKLR for proposition that cases are consolidated for expedience, to save on costs and judicial time and also Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR for the proposition that the essence of consolidation is to facilitate the efficient and expeditious disposal of disputes; that the appellant’s case before the court was already closed and the respondents will suffer prejudice if appeal is allowed; and that the appellant is guilty of laches having brought the application 6 years later.
28. The learned Judge found that the appellant did not meet the parameters set under Order 45 Rule 1 of the Civil Procedure Rules, for bringing the application six years after the order was made without any explanation, thus inordinately late; further, the appellant did not show that there has been discovery of any new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at a time, or he must show that there is some mistake or error apparent on the face of the record or there was any other sufficient cause.
29. The respondents counsel argued that the consolidation of the subject suits was well founded as the reliefs claimed arise from the same series of transactions. It was argued that there was no evidence that the respondents misled the appellant or the court to make an order for consolidation. On the issue of delay, it was argued that indeed the review application was brought after unreasonable delay. Counsel refuted that there was reason to review the consolidation order, neither was there reason to deconsolidate the suits as the appellant closed its case based on the consolidation order. While citing the case of Chemweli Jangaa Mangale & 3 Others v Hamisi Mohammed Mwawasaa & 15 Others [2016] eKLR it was argued speedy justice militates against the deconsolidation of the matters.
30. Section 80 of the Civil Procedure Act provides for right of a party aggrieved by an order or decree to apply for review. The principles that apply to applications for review before the High Court are set out under Order 45 Rule 1 of the CPR.

“ Application for review of decree or order.

“1. (1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”



31. Therefore, Order 45 of the *Civil Procedure Rules*, 2010 is very explicit that a court can only review its orders if the following grounds exist:
- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
  - (b) There was a mistake or error apparent on the face of the record; or
  - (c) There were other sufficient reasons; and
  - (d) The application must have been made without undue delay.
32. The pertinent issue for determination herein, therefore, is whether the Appellant established any of the above grounds to warrant an order of review.
33. In *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:
- “...In *Nyamogo & Nyamogo v Kogo* [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”
33. The gravamen of the appellant’s submissions is that the learned Judge failed to appreciate that the High Court lacked jurisdiction to entertain the consolidated suits, thus falling into error by failing to de-consolidate the cases. It is the appellant’s argument that jurisdiction was so fundamental that the court could, suo moto take action to rectify the situation. On the issue of jurisdiction, the High Court found that the issue ought to have been brought in the proper procedure to enable the court determine the same on merit and not in an application for review.
34. It is clear that the learned Judge declined to consider the issue of jurisdiction on the ground it should have been brought in the proper procedure. The proper procedure was not stated and we do not want to assume what could have been meant by that.
35. We have considered the basis upon which the appellant argues that the application for review should have carried the day. First we have looked at the affidavit sworn by Anthony Masila advocate in support of the application before the High Court. At Paragraph 2 he avers that the order given on 30<sup>th</sup> August 2012 consolidating the case with HCCC No. 20 of 2011 and HCCC No. 111 of 2008 was a mistake and an error on the face of the record. He then gives the reasons for the averment in the main as the lack of jurisdiction on the part of the High Court to entertain the claims in HCCC No. 20 of 2011 and HCCC No. 111 of 2008, the two being matters concerned with land use and occupation, which he avers was the preserve of the ELC.



36. We have noted that the order for the consolidation was made in August 2012. We take Judicial Notice that Environment and Land Court (ELC) was established upon the commencement of the *Environment and Land Court Act*, 2011, which Act came into effect on 30<sup>th</sup> August 2011. The ELC Act had Transitional Provisions. Section 30 of the said Act provides:

“ 30. Transitional provisions

(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

2. \_\_\_\_\_ The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.” (Emphasis ours)

37. The Transitional provision under Section 30 of the ELC Act is very clear concerning the jurisdiction to hear matters relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction. The statutory direction was that matters pending before the courts or tribunals shall continue to be heard and determined by the same court until the Environment and Land Court established under the Act came into operation or as may be directed by the Chief Justice or the Chief Registrar. The Section did not talk of part heard matters, but matters pending before those courts or tribunals.

38. Following the enactment of the ELC Act, the process of establishing the EL Court proceeded in earnest. On 25<sup>th</sup> July 2014, vide Gazette Notice No. 5178 the Chief Justice published Practice Directions on Proceedings in the Environment and Land Courts relating to the Environment and the use and occupation of, and title to land and proceedings in other courts. This was in compliance to Section 30 of the ELC Act. The Directions provided:

“

“ 3. All pending judgments and rulings relating to the environment and the use and occupation of, and title to land pending before the High court shall be delivered by the same court.

4. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.

5. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by a judge.

6. All cases touching on inheritance, succession and distribution of land under the Law of Succession Act, Cap. 160 Laws of Kenya shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.



7. All proceedings which were pending before the Magistrates Court, having been transferred thereto from the now defunct District Land Disputes Tribunals, shall continue to heard and determined by the same courts.
8. Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. All proceedings which were pending before the Magistrates Court, having been transferred thereto from the now defunct District Land Disputes Tribunals, shall continue to heard and determined by the same courts.”

39. These Directions were published in 2014. That means that the appellant in impugned application for review needed to demonstrate that the jurisdiction he was urging the High Court lacked was supported by the ELC Act, in particular but not limited to Section 30, as well as the Chief Justices’ Directions of 2014.

40. The question that begs an answer is whether the mistake or error apparent on the face of record, upon which the appellant grounded his application met the definition in *Nyamogo & Nyamogo -vs- Kogo*, *Supra*? We do not think so. There is no error on a substantial point of law staring us on the face where there could reasonably be no two opinions. The error urged by the appellant needed to be established by long drawn process of reasoning along the lines we have discussed herein above. What the appellant urged could have been a good ground of appeal, where the parties would have the liberty to bring their arguments to prove their respective positions. That avenue is not open in an application for review, given the definition of what constitutes a mistake or error on the face of the record. For that reason, the High Court was right not to make a determination on the issue of jurisdiction in the circumstances of the case.

41. To buttress this fact further, in *Abasi Belinda v Frederick Kangwamu and another* [1963] E.A. 557 the court held that:

“a point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”

42. We have carefully considered this appeal and find that the judge properly directed herself in law, that she correctly apprehended the facts, took into account all that she should have considered and came to the right decision. We therefore find that there is no reason to interfere with the learned Judge’s exercise of discretion.

43. The result is that we find no merit in this appeal and accordingly dismiss it in its entirety.

**DATED AT MOMBASA THIS 10TH DAY OF JUNE, 2022**

**S. GATEMBU KAIRU (FCI Arb)**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**



**J. LESIIT**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

